
U.S. Department of Labor
Office of Administrative Law Judges
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Date: AUG 19 1997

Case No. 96-ERA-34

RONALD THOMPSON,
Complainant

v.

HOUSTON LIGHT & POWER
COMPANY,
Respondent

Case No. 96-ERA-38

RONALD THOMPSON,
Complainant

v.

HOUSTON LIGHT & POWER
COMPANY and
HOUSTON INDUSTRIES, INC.
Respondents

**ORDER GRANTING RESPONDENTS'
MOTION FOR PARTIAL SUMMARY DECISION**

This Judge again revisits the effect of a Settlement Agreement and Full and Final Release, executed by the parties on October 25, 1995, on the present claim. In this

Settlement Agreement, which was approved by the Secretary by Final Order issued December 4, 1995, the Respondents agreed to "warrant that Complainant's access to the South Texas Project has not been suspended, revoked or denied." Settlement Agreement, Part II, pare. 5(b). Subsequent

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to execution of the Agreement, Complainant raised concerns, which he also brought to the attention of the NRC, about whether Respondents would be able to comply with the language of paragraph 5(b).

By document filed April 22, 1997, Respondents have submitted a Motion for Partial Summary Decision. In support thereof, Respondents argue Complainant's complaint should be partially dismissed as a matter of law because a claim for anticipatory breach of a Settlement Agreement is not a cognizable claim under the ERA. Respondents characterize Complainant's claim as a contingent hypothetical claim which presents an essentially "`if and when" situation and reason that Complainant cannot possibly establish a claim for violation of the ERA based on breach of the Settlement Agreement due to the absence of discrimination.

Complainant's opposition, filed July 16, 1997, argues that Respondents have already breached the warranty provision on at least two occasions or, in the alternative, that there is a violation of the ERA even if this complaint is interpreted as an anticipatory breach issue. Complainant proceeds to explain how his complaint establishes the elements of a **prima facie** claim under the ERA. **See** Complainant's Opposition, pp. 5-6. In conclusion, Complainant argues that Respondents' present Motion must be denied based on outstanding discovery requests which would, Complainant anticipates, provide further information relevant to the issue of Respondents' violation of the ERA rooted in breach of the Settlement Agreement.[1]

Respondents' reply brief, filed by facsimile on July 21,1997, focuses again on Respondents' aforementioned argument, but adds a different twist. Respondents emphasize Complainant is attempting to enforce the Complainant's interpretation of the warranty language in the Settlement Agreement before this Administrative Law Judge. Respondents then argue such an issue is properly within the realm of a reviewing court, **i.e.**, the U.S. District Court.

Indisputably, a complainant may bring an action, in the appropriate circumstances, pursuant to the ERA for violation of a settlement agreement. **Gillilan v. Tennessee Valley Authority,** 91 -ERA-31/34 (Sec'y 8/28/95), **settled by Final Order,** (ARB 5/30/96); **Blanch v. Northeast Nuclear Energy Co.,** 90-ERA- 11 (Sec'y 5/11/94); **O'Sullivan v. Northeast Nuclear Energy Co.,** 90-ERA-35 (Sec'y 12/10/90). In the circumstances of this case, however, this black letter rule invites disputable results and requires this Judge venture into what is typically referred to as the gray area of the law.

The aforementioned cases which set forth the general rule typically present a situation wherein a settlement agreement was executed and a complainant then brings suit based on violation of one of its terms. **Gillilan, supra,** (wherein the Secretary dismissed complainant's complaint for violation of the ERA rooted in breach of settlement agreement where the Secretary never approved the agreement and, therefore, there was no obligation on respondent to perform in accordance with its terms for purposes of the ERA); **Blanch, supra,** (wherein the Secretary referred relevant documents for investigation

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where complainant claimed respondent had violated the spirit and intent of the agreement). Complainant Thompson attempts to bring his claim within this boundary by his most recent filing where he argues the Respondents have already breached the settlement agreement by their failure to respond to inquiries by Complainant's counsel and the NRC. It is plain from reviewing Complainant's entire theory of the case, however, that Complainant has presented a fundamentally different theory of liability.

In short, Complainant has argued that Respondents will not be able to perform as warranted by paragraph 5(b) of the Settlement Agreement because that paragraph is unenforceable as violative of NRC rules and/or regulations, **i.e.**, paragraph 5(b) is unenforceable as against public policy. It is because of this dubious enforceability, Complainant alleges, that Respondents have been unable to answer inquiries submitted by Complainant and/or the NRC to Complainant's satisfaction. This theory is significantly distinguishable from the aforementioned cases in that Complainant Thompson alleges a breach of the Settlement Agreement by attacking the enforceability of a provision of the Settlement Agreement which has been approved by the Secretary.

It follows, therefore, that Complainant has failed to state a valid cause of action based on the fact that he alleges a theory of liability that is not properly presented to this Administrative Law Judge. As this Judge has previously held, and it is a ruling to which I continue to adhere, Complainant may neither bring an enforcement action before this Administrative Law Judge[2] nor can he bring a Motion to Set Aside the fully executed and Secretary-approved Settlement Agreement before this Administrative Law Judge. A careful examination of Complainant's theory of the case[3] makes evident that this is precisely what he attempts to do.

The enforceability or unenforceability of a particular clause of a settlement agreement is a factor properly considered when assessing whether an agreement is a fair, adequate and reasonable settlement of a complainant's ERA claim. It is clear that the Secretary's role vis a vis a settlement agreement is carefully circumscribed: the Secretary may either approve or disapprove an agreement presented to him or her. Indeed, in **Macktal v. Brown & Root, Inc.,** 86-ERA-23 (Sec'y 10/13/93), the Secretary considered the fact that the submitted settlement agreement contained an unenforceable clause and disapproved the agreement based on the offending provision.[4] The Secretary's role in reviewing

settlements in ERA cases, however, should not be confused with that of a court which might be called upon to enforce such a contract.

In the alternative, I question whether this case may present, as the parties have argued, the question of whether anticipatory breach may serve as the basis for a claim under the ERA.[5] Generally, breach of a contract by anticipatory repudiation results where there is a serious manifestation by one party to a contract to the other party to the contract that the first party cannot perform part or all of its duty under the

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contract. **See Generally** Farnsworth on Contracts v. II, §8.21 at p. 474. Moreover, this intention not to perform must be communicated to the party to the contract and not some third person.[6] **Id**. at 476. Respondents have consistently informed Complainant that they would perform their obligation as provided in the Settlement Agreement. Indeed, Complainant's counsel has been supplied, in writing, a statement from Respondents' counsel that "it has been and remains" Respondents'"intention to comply fully with the Agreement." **See** Complainant's Opposition, Exh. 4, Letter from Attorney Randy T. Leavitt to Attorney David Colapinto, dated May 15, 1996.

Even assuming the situation presented could be characterized as a case of anticipatory repudiation, the Complainant has failed to state a recognizable claim. In order to make out a case for anticipatory breach, there must be an underlying valid contract provision. It is specifically Complainant's complaint in this case that the underlying provision is unenforceable and, **a fortiori,** it can not be breached by anticipatory repudiation.

Accordingly, Respondents' Motion for Partial Summary Decision is hereby **GRANTED**. The Settlement Agreement at the heart of Complainant's claim has been approved by the Secretary's December 4, 1995, Final Order and any enforceability issue regarding its terms should be argued before the appropriate U.S. District Court. The substance of this Order shall be incorporated into this Judge's Recommended Decision and Order in this matter, which recommendation shall be transmitted, at the appropriate time, to the Administrative Review Board for final decision.

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts

DWD:jw:ln

[ENDNOTES]

[1]This argument is unpersuasive because my decision is premised upon the determination that Complainant's theory of liability fails to state a valid cause of action under the ERA.

[2]Indeed, there has been authority issued since my November 27, 1996 Order on Various Motions for Summary Decision which implicitly supports my ruling that an Administrative Law Judge has no authority to re-visit a settlement agreement approved by the Secretary. In this regard, **see Smith v. Tennessee Valley Auth.,** 97-ERA-25 (ALJ 3/12/97), **dismissed without comment**, (Sec'y 4/23/97).

[3]It is Complainant's theory that the provision at issue is unenforceable based on concerns raised by Complainant and brought to the attention of the NRC, which authority then interposed its own concerns on the provision. Again, this Judge notes that Complainant would have been within the time frame established for filing a Petition for Review, **see** 29 C.F.R. Part 24.7(a), had he acted upon the NRC's written notification expressing what Complainant describes as its opinion that paragraph 5(b) is void on the grounds of public policy and federal law. **See** Order on Various Motions for Summary Decision, (ALJ 11127196), at p. 5 and nn. 5 & 6.

[4]The October 13, 1993 decision in **Macktal** is procedurally distinguishable because the efficacy of approving that settlement was still under consideration and the questionable provision was specifically challenged on the grounds that it ran contrary to public policy. In this case, the Settlement Agreement has been approved by the Secretary's Final Order as a fair, adequate and reasonable settlement of Complainant Thompson's ERA claims.

[5]For the record, this Judge is not prepared to hold that an anticipatory repudiation of a Settlement Agreement can never be actionable under the ERA because I can clearly envision circumstances where it might be. I therefore assume that such a claim is actionable and nevertheless find Respondents' Motion for Partial Summary Decision to be properly allowed.

[6]For this reason, Respondents alleged failure to respond in any way to the inquiries made by the NRC is of little to no value in assessing whether Respondents have anticipatorily breached the Settlement Agreement.